



TOPIC: Pension Funding Equity Act of 2004

EXECUTIVE SUMMARY: ON SATURDAY, APRIL 10, 2004, PRESIDENT BUSH SIGNED THE PENSION FUNDING EQUITY ACT OF 2004 WHICH PROVIDED A TEMPORARY REPLACEMENT FOR THE 30 YEAR TREASURY BOND RATE USED IN CALCULATING LIABILITIES FOR SINGLE EMPLOYER DEFINED BENEFIT PENSION PLANS AND PROVIDED SIGNIFICANT RELIEF FROM MAKING ADDITIONAL CONTRIBUTIONS TO UNDERFUNDED PLANS IN THE STEEL AND AIRLINE INDUSTRIES. UNFORTUNATELY, DUE TO DIRECT INTERVENTION BY THE WHITE HOUSE, THE PROPOSED RELIEF FOR MULTIEMPLOYER PLANS WAS INTENTIONALLY SCALED BACK TO EFFECTIVELY LIMIT THE NUMBER OF PLANS THAT COULD QUALIFY TO 1% - 2% OF ALL PLANS. MOREOVER, THE RELIEF PROVIDED WAS REDUCED TO SUCH AN EXTENT AS TO MAKE IT VIRTUALLY MEANINGLESS TO MANY IF NOT MOST OF THE PLANS THAT DO QUALIFY. THIS ISSUE OF MULTI-ELERT WILL EXAMINE THE NEW LAW AND ITS IMPLICATIONS FOR MULTIEMPLOYER PLANS AND THEIR CONTRIBUTING EMPLOYERS.

PURPOSE: INFORMATIONAL

CATEGORY: NEW LEGISLATION

ISSUER: CONGRESS

TARGET AUDIENCE: ALL MULTIEMPLOYER FIDUCIARIES, SPONSORING EMPLOYERS AND THEIR PROFESSIONAL ADVISORS

INPUT REQUESTED: IF YOUR PLAN IS FACING A FUNDING DEFICIENCY, PLEASE ADVISE THE NCCMP AS TO WHEN THAT WILL OCCUR AND WHETHER THE RELIEF CONTAINED IN THIS LEGISLATION IS HELPFUL TO YOUR PLAN.

NCCMP DEADLINE: AS SOON AS POSSIBLE

FORWARD COMMENTS TO: Multi-elert@nccmp.org

REFERENCE: VOL.4, ISSUE 1,

FOR ADDITIONAL BACKGROUND SEE: MULTI-ELERT VOL.3, ISSUE 1 AND VOL. 4, ISSUE 1, AND H.R. 3108 THE "PENSION FUNDING EQUITY ACT OF 2004"

MULTIEMPLOYER DEFINED BENEFIT PENSION RELIEF: A WHITE HOUSE POLITICAL CASUALTY

Months of dedicated lobbying by a broad based labor-management coalition spearheaded by the NCCMP to jointly work for temporary funding relief for multiemployer defined benefit pension plans were dismissed last week without consideration of the merits. The final blow came when the White House weighed in with the majority Republican members of a joint House – Senate Conference Committee that considered H. R. 3108, now known as the “Pension Funding Equity Act of 2004,” effectively stripping out any meaningful relief from the final legislation. This issue of Multi-Elert will briefly review the process, explain the law’s pertinent parts as they pertain to multiemployer plans, and offer a glimpse of what we can expect in the promised upcoming debate over long-term, comprehensive pension reform.

BACKGROUND

As reported in earlier issues of Multi-Elert, the proposal for multiemployer funding relief started out quietly enough, as part of the bipartisan pension bill introduced by Representatives Rob Portman (R-OH) and Ben Cardin (D-MD) in the House of Representatives, but quickly died there when the multiemployer provisions were stripped from Chairman Bill Thomas’ (R-CA) mark-up in the Ways and Means Committee that featured a display of bare-knuckled partisanship of epic proportions. That fight ended with Mr. Thomas calling the Capitol Police to have the Democrat members removed from the Committee library, followed by days of demands for apologies from the House floor for Mr. Thomas’ outrageous behavior.

What followed was a brief, lucid period of statesmanship when the Senate actually considered the merits of the proposal. They recognized that rather than being a “Union Bailout” as several of their more conservative (but less informed) House colleagues had contended, the Senate proposal offered labor and management time to negotiate a reasonable, private sector solution to this problem, without sacrificing jobs and without a taxpayer subsidy. Although the Senate effort was temporarily side-tracked because of the efforts of United Parcel Service (which opposed temporary relief as part of a broader strategy to obtain through legislation the destruction of multiemployer plans in the transportation industry that it was unable to get through bargaining with the Teamsters), the merits of granting relief to more than 60,000 contributing employers outweighed the selfish interests of one (UPS), resulting in passage of the Senate proposal by an overwhelmingly bipartisan majority vote of 86 to 9.

In the end, however, the House leadership, encouraged by the direct intervention by the White House, imposed its political will on the Conference to deny any meaningful relief to employers and participants of multiemployer plans, simply because, as Mr. Thomas stated during the House debate of the measure, “...multiemployer plans tend to be representatives of the unions.” Following passage by the Conference by a party line vote, the House quickly adopted the Committee report (as modified after adoption by the Conference to appease those representing the interest of UPS). In the Senate, however, the merits continued to trouble many Senators, including especially Senator Edward Kennedy (D-MA) who staunchly fought for “equity” for multiemployer plans in the Pension Funding Equity Act of 2004. Despite a valiant effort by Senator Kennedy to persuade the Democratic caucus to oppose the bill, the need to pass relief for single employer plans ultimately prevailed, and the legislation was passed by the Senate.

THE PENSION FUNDING EQUITY ACT OF 2004

This legislation contains three major provisions pertaining to multiemployer plans: Additional notice and disclosure requirements that apply to all plans; temporary deferral of a portion of the experience loss suffered in the first plan year beginning after December 31, 2001, and a limited change in the presumption that withdrawal liability is due with respect to an action taken by an employer before January 1, 1999 where it is determined by the plan sponsor that the purpose of such action was to evade or avoid withdrawal liability.

Notice and Disclosure Requirements

Beginning with the first plan year after December 31, 2004, all multiemployer defined benefit plans will be required to provide additional disclosure notices to all participants and beneficiaries, each labor organization representing such participants and beneficiaries, each employer that has an obligation to contribute to the plan and the Pension Benefit Guaranty Corporation (PBGC). In addition to the usual identifying information, these new notices must include:

- a “plan funding notice” based on the plans’ funded current liability percentage for the plan year to which the notice applies. If a plan’s funded percentage is 100% or more it will report 100%, or if less, the actual percentage;
- a statement of the value of the plan’s assets, the amount of benefit payments and the ratio of the assets to the payments for the plan year to which the notice relates;
- a summary of the rules governing insolvent multiemployer plans, including the limitations on benefit payments and any potential benefit reductions and suspensions (and the potential effects of such limitations, reductions and suspensions on the plan); and
- a general description of the benefits under the plan which are eligible to be guaranteed by the PBGC, along with an explanation of the limitations on the guarantee and the circumstances under which such limitations apply.

These notices may also include any other information the plan administrator deems appropriate that “are not inconsistent with the regulations prescribed by the Secretary.” The notice is required to be mailed no later than two months after the deadline (including extensions) for filing the plan’s annual 5500 filing.

Temporary Deferral of Experience Losses

In a significant departure from either the relief proposed in HR 1776 (Portman-Cardin) or the Senate version of HR 3108, the Act has substantially paired back the number of plans that are eligible for relief and the relief itself. Under the law an “Eligible Plan” is one that:

- had a net experience loss for the first plan year beginning after December 31, 2001 of at least 10% of the average fair market value of the plan’s assets during the plan year; and
- the plan’s actuary must certify that, not taking into account the relief provided, and using the actuarial assumptions used for the last plan year ending before the date of enactment of the Act, the plan is projected to have an accumulated funding deficiency for any year beginning after June 30, 2003 and before July 1, 2006.

These rules are further modified, however, to exclude any plan for which:

- any employer failed to pay any excise tax due with respect to the plan in any taxable year in the last 10 years (since 1993);
- for any year since June 30, 1993, has had an average contribution required to be paid to the plan by all employers that contribute to the plans of 10 cents per hour or less;
- for any year beginning after June 30, 1993, received a funding waiver or amortization extension.

Any plan that elects the relief provided under the Act must, within 30 days of such election, notify plan participants, beneficiaries, related unions, contributing employers to such plans and the PBGC of the amounts to be deferred and the period of deferral, and of the maximum benefit payable under the plan if the plan were to be terminated during the deferral period.

Limited Change to Procedures Applicable to Disputes Involving Withdrawal Liability

If a plan determines that:

- a complete or partial liability has occurred or that an employer is liable for withdrawal liability; and
- that determination is based at least in part on a determination that a principal purpose of a transaction that occurred before June 30, 1999 was to evade or avoid withdrawal liability; and
- such transaction occurred at least five years before such complete or partial withdrawal,

then special rules apply to the assessment of the withdrawal liability. These include:

- the determination of withdrawal made by the plan shall not be presumed to be correct; and
- the plan shall have the burden to establish, by a preponderance of the evidence, the elements of the claim that a principal purpose of the transaction was to evade or avoid withdrawal liability.

Unlike under the current requirements, an employer who contests the assessment of withdrawal liability under these circumstances through arbitration or in a court proceeding, the employer is not required to make withdrawal liability payments until after the claim is upheld through the final arbitration decision or court upholds the plan's determination.

COMPREHENSIVE REFORM

In 2003, the House Workforce and Education Committee opened a series of hearings and studies into the preservation of defined benefit pensions. The first hearing examined the single-employer system, the second, held in March 2004 examined multiemployer plans. Among the issues addressed was a study by the U. S. General Accounting Office, commissioned jointly by the Chairmen of the Committee, John Boehner (R-OH) and of the Sub-committee on Employer – Employee Relations, Sam Johnson (R- TX). That study concluded that the decline in the percentage of the workforce represented by unions, the decline in the proportion of active to retired participants, and the lack of new plans created over the past 20 years, suggests that the future of multiemployer defined benefit plans is not particularly bright. This perception was

reinforced by a spokesman for UPS who used his appearance to underscore his firm's position regarding the need for fundamental restructuring of the multiemployer system.

During that hearing and subsequently, during the debate in Conference over the temporary relief provisions contained in HR 3108, Chairman Boehner indicated his belief that additional reform of the funding rules for multiemployer plans is necessary. Based on the proposals put forth in the debate over temporary relief, it is likely that this effort will produce proposals over the next few months that will attempt to:

- impose additional funding restrictions;
- inject a permanent linkage between a plan's funding levels and the trustees' ability to make benefit improvements;
- advance the proposal advocated by UPS' as detailed in HR 2910 and S 1492 to simplify an employer's ability to partition existing liabilities and convert a multiemployer plan to a multiple employer plan; and
- revisit the concept of withdrawal liability.

CONCLUSION

The Pension Funding Equity Act of 2004 squandered an opportunity for lawmakers to avoid the potentially destabilizing effects of a funding deficiency for hundreds of multiemployer plans and the accompanying economic hardship for thousands of contributing employers. The Act provides too little relief, to too few plans, incorporating too many poorly conceived restrictions designed to narrow the number of plans eligible for relief by applying criteria that have a low correlation to those most likely to incur a funding deficiency. In the end, these criteria were repeatedly narrowed to facilitate a political accommodation by those who promised that multiemployer plans would receive relief as a means of moving the bill to the Conference process, but who had no intention of permitting multiemployer plans to achieve meaningful relief. The debate was complicated by a combination of anti-union ideology and a significant lack of understanding of what multiemployer plans are, how they are managed, and who they cover. The recent effort provided an important first step in exposing significant numbers of Congressional and Senate staff to a primer in multiemployer plans, and was helpful in building some important relationships for the future.

Looking forward, the upcoming debate over comprehensive reform will be conducted in the same political environment. If this debate is to produce a better outcome, it will be necessary to increase our efforts to educate members and their staffs about multiemployer plans, and to expand Congressional contacts with the Republican leadership by contributing employers to emphasize the importance of these plans to small businesses in every industry. It will also be necessary to increase the level of specificity regarding plans that have encountered funding deficiencies and the steps that have been taken to address their problem.

If you are aware of any plan that is projected to have a funding deficiency; or of any employer that is willing to discuss with lawmakers the impact of such a deficiency on their business, please forward that information to the NCCMP to help us assemble such information for the next round.